IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
CIVIL REVISION APPLICATION No 329 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BATUKBHAI DAMAJIBHAI
Versus
HEIRS & L.R. OF DECD. JERAMBHAI K RUPARELIYA

Appearance: MR SANDEEP N BHATT for the Petitioner.
MR KISHOR M PAUL for the Respondent.

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 20/01/2004
ORAL JUDGEMENT

1. This revision application is filed by the original defendant of Regular Civil Suit No.27 of 1984. The respondent landlord filed the aforesaid suit for getting decree for possession on the ground that the defendant has no right to occupy the suit premises after the death of the original tenant.

2. One Ratilal Damjibhai was the sole tenant of the suit premises, which, undisputedly, is a business premise. After his death, the present defendant tried to assert his tenancy right in the suit premises on the ground that he, being the brother of the deceased tenant, is entitled to retain the suit premises. The plaintiff, therefore, filed the aforesaid suit on the ground that

the defendant has no right to occupy the suit premises and he cannot be said to be the heir of the deceased tenant. It is also the case of the plaintiff that the defendant has not paid the rent and even on that ground, he is required to be evicted from the suit premises.

3. Before filing the suit, a demand notice as required by Section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ("The Bombay Rent Act", for short) was also served on the defendant, but, according to the plaintiff, he refused to pay the arrears of rent. The plaintiff, ultimately, approached the Court for getting decree for possession.

4. The petitioner herein, who is the original defendant in the said suit, resisted the said suit by taking the plea of transmission of tenancy. It is the say of the defendant that after the death of the original tenant, he is occupying the suit premises and as the heir of the original tenant, he is entitled to retain the possession of the suit premises under Section 5(11)(c) of the Bombay Rent Act.

5. The learned trial Judge, after framing various issues, and after recording evidence, came to the conclusion that the defendant has no right to occupy the suit premises. It was found that there is no evidence on record to show that the petitioner used the suit premises for doing business with his brother, who was the original tenant of the suit premises. The trial court also found that it has jurisdiction to decide the suit as rent court, as, ultimately, transmission of tenancy is required to be decided by the Small Causes Court. Ultimately, the trial court decreed the suit for possession.

6. Against the aforesaid decree of the trial court, the petitioner carried the matter by way of appeal before the District Court. The same was numbered as Civil Appeal No.34 of 1994. The appellate court, after considering the evidence on record and after considering the arguments of both the sides, came to the conclusion that the defendant has no right to occupy the suit premises in any manner and the appellate court accordingly confirmed the decree for possession passed by the trial court. Against the aforesaid concurrent findings of fact recorded by both the courts below, this revision application is preferred by the original defendant.

7. At the time of hearing of this CRA, it was argued

by the learned Advocate for the petitioner-original defendant that after the death of his brother, he is entitled to retain the possession of the suit premises under Section 5(11)(c) of the Bombay Rent Act. It was also argued by Mr.Bhatt that even though the suit premises is business premises, the defendant was also residing occasionally in the suit premises. It was argued by him that, during the pendency of the suit, the original plaintiff died, but, his heirs were not brought on record and, therefore, the decree is in favour of a dead person and, therefore, the same is a nullity and on that ground, the suit was required to be dismissed by the trial court.

It is also argued by Mr.Bhatt that when, according to the plaintiff, the defendant is a trespasser, the rent court has no jurisdiction, as, only the ordinary civil court was competent to decide the controversy in question. It is prayed that, on the aforesaid grounds, the decree passed by the trial court, which is confirmed by the appellate court, is required to be set aside.

8. I have heard the arguments of the learned Advocates for both the sides. I have also gone through the judgments of both the courts below.

9. So far as the question about the jurisdiction of the trial court is concerned, it is required to be noted that there was a specific issue framed by the trial court in connection with the transmission of tenancy under Section 5(11)(c) of the Bombay Rent Act. Since the defendant was asserting his tenancy rights, the plaintiff went before the Small Causes Court and there was an issue framed by the Court in connection with the transmission of tenancy rights. Both the sides addressed the Court on the aforesaid point.

So far as the question about the transmission of tenancy is concerned, the said question is required to be decided by the Rent Court and only the Rent Court is competent to decide the said question. The Rent Court, which is a special court constituted under the Act, therefore, is entitled to decide such question. It, therefore, cannot be said that the Small Causes Court had no jurisdiction to decide the suit in question. The Court has decided the question of transmission of tenancy as provided by Section 5(11)(c) of the Bombay Rent Act and, therefore, the rent court was competent to decide the said question in the present suit.

10. It was next argued by Mr.Bhatt that the present

petitioner was also residing in the suit premises and, therefore, he is entitled to inherit the tenancy under the provisions of Section 5(11)(c) of the Act. At this stage, reference is required to be made to Section 5(11)(c) of the Bombay Rent Act, which reads as under :-

" ... ...

5. In this Act unless there is anything repugnant to the subject or context--

xxx xxx xxx

(11) "tenant" means any person by whom or on whose account rent is payable for any premises and includes--

xxx xxx xxx

(c) (i) in relation to premises let for residence, any member of the tenant's family residing with the tenant at the time of, or within three months immediately preceding, the death of the tenant as may be decided in default of agreement by the Court, and

(ii) in relation to premises let for business, trade or storage, any member of the tenant's family carrying on business, trade or storage with the tenant in the said premises at the time of the death of the tenant as may continue, after his death, to carry on the business, trade or storage as the case may be, in the said premises, and as may be decided in default of agreement by the Court;

... ..."

It is not in dispute that the suit premises is a business premises and, therefore, any member of the tenant's family doing business with the deceased tenant is entitled to get the benefit of the said provision. In this connection, the finding of fact recorded by the appellate court is required to be considered. It has been observed in paragraph 11 by the appellate court as under :-

" ... ...

11} The appellant Shri Batukbhai himself has stated in his deposition that deceased

> tenant Shri Ratilal had taken divorce from his wife and thereafter he had remained alone i.e. he has not remarried and there is no issue also. This original tenant Shri Ratilal is died on 16/11/1981 and thereafter, till 27/01/1984 on which the suit was filed, the shop was in a locked condition and even at the time of preparing panchnama by the Court Commissioner, the shop was found in a locked condition and dust had collected around the lock and the lock was also in a rusted condition.
>
> ... ..."

It is also clearly found by the appellate court that the defendant has not produced any evidence to show that, at any point of time, the mother of the original defendant or any of his brothers was residing in the suit premises or either of the relatives was doing business with the deceased tenant in any manner. It has been found by the appellate court in paragraph 11 that the original tenant Ratilal has taken divorce from his wife and thereafter, he has not remarried. He died on 16.11.1981. The suit was filed on 27.01.1984 and at the time of preparing the panchnama, it was found that the shop in question was in a locked condition and dust has collected around the lock and the lock was found in a rusted condition. It seems that the present petitioner tried to claim tenancy rights after the death of his brother with the sole object of continuing the possession of the suit premises. Since it is found that the present petitioner was not doing business with his brother, and since it is even found that the suit premises were kept closed, in my view, it cannot be said that the courts below have committed any error of law in reaching the conclusion that the present petitioner-original defendant never used to do business with his deceased brother at any point of time. The finding of fact arrived at by both the courts below is based on the evidence on record and this Court, in a revision application, cannot re-appreciate the evidence. Even if it is assumed that this court can re-appreciate the evidence, then also, in my view, no other view is possible other than the one taken by the courts below. In that view of the matter, in my view, it cannot be said that the courts below have committed any error of law in reaching the conclusion that the petitioner is not entitled to get the benefit of Section 5(11)(c) of the Bombay Rent Act.

11. It was next argued by Mr.Bhatt that, at the time when the suit was pending, i.e. even before the arguments of both the sides were concluded, the plaintiff died and his heirs were not brought on record before the trial court. It is required to be noted that before the trial court, no such point was argued, naturally because at the time of the death of the original plaintiff, evidence was already recorded and the arguments of the Advocate of one of the sides was already over. At the time when the appeal was filed, since the summons of the appeal was not served on the original plaintiff, as he was no more at that time, ultimately, his heirs were brought on record. The appellate court has considered this aspect. In paragraph 16, the appellate court has observed as under :-

" ... ...

16. The appellant has raised a further question of law in this appeal. It has been submitted on behalf of the appellant that the impugned judgment and decree have been passed in favour of a dead person and, therefore, they are null and void. But, this argument canvassed on behalf of the appellant cannot be accepted on perusal the R & P and proceedings. On going through the R & P and proceedings, it comes out that the matter was came at the stage of final argument on 10/12/1993 and thereafter the matter for hearing of the arguments of the parties was adjourned at least for 6 adjournments and the landlord completed his argument on 27/01/1994. Thereafter, the appellant has completed his argument on 15/03/1994, in other words, after completion of recording of evidence and hearing the arguments on behalf of the landlord the matter was adjourned for hearing of arguments of the appellant side and the lastly the appellant side finished its arguments on 27/01/1994. During this period, the landlord Shri Jerambhai Karamshibhai died on 08/03/1994. If the evidence of both the sides are over, the plaintiff side is heard finally and thereafter the plaintiff expires and the decree is passed in favour of the plaintiff, it cannot be said that the decree has been passed in favour of a dead person and, therefore, the judgment and decree are null and void.

The Hon'ble Supreme Court has observed on this point in the judgment reported in A.I.R. 1996

Supreme Court 116, relevant page-117, para-3 that in view of Order-22, Rule-6 there can be no abatement by reason of death of any party between the conclusion of hearing and the pronouncement of the judgment. It may be pronounced, notwithstanding the death, and shall have the same force and effect as if judgment has been pronounced before the death took place. Hence, the arguments canvassed on behalf of the appellant by relying upon the relevant provisions of Order-22, Rule-6 cannot be accepted in view of the ratio laid down in the above said case law.

... ..."

It is required to be noted that, at the time when the trial court passed the decree, it is not in dispute that the original plaintiff died after the evidence was already recorded and after the argument on behalf of the plaintiff was over.

12. Mr.Paul has also relied upon the judgment of the Apex Court in N.P. Thirugnanam (D) by L.Rs. v. Dr.R. Jagan Mohan Rao and others, AIR 1996 SC 116, which is also relied on by the appellate Court. In the said judgment, it has also been further observed by the Apex Court as under :-

" ... ...

The first ground raised in the SLP is that the decree of dismissal against the dead plaintiff appellant is a nullity. We find no force in the contention. It is true that the plaintiff died on December 26, 1994 by which date the arguments in the appeal were already heard and the judgment was reserved. The counsel for the plaintiff filed a Memorandum bringing to the notice of the court the demise under Order 22 Rule 11-A of CPC and prayed for time to bring on record the petitioners as legal representatives to represent the estate of the deceased. The court declined to accede to the request.

Rule 6 of Order 22 provides that:

"No abatement by reason of death after hearing:
"Notwithstanding anything contained in the foregoing rules, whether the cause of action

survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgement, but judgement may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place."

In the face of the explicit language in Rule 6 of Order 22, there can be no abatement by reason of the death of any party between the conclusion of the hearing and the pronouncement of the judgement. It may be pronounced, notwithstanding the death, and shall have the same force and effect as if judgment had been pronounced before the death took place. Therefore, the contention that the judgement and decree of the appellate court is a nullity is devoid of substance.

... ..."

However, even assuming that the original plaintiff died before the arguments of both the sides were heard by the Court, then also, it is required to be noted that at least the argument of the Advocate of the plaintiff was already over at the time when the original plaintiff died and, ultimately, even otherwise, the decree of the trial court can be said to have been merged with the decree of the appellate court, and when the appellate court decided the appeal and passed the decree, the heirs were already on record. It, therefore, cannot be said that this being a case of decree in favour of a dead person, the same is a nullity. That argument advanced by the petitioner is required to be negatived.

Since I do not find any substance in any of these contentions, the revision application is required to be dismissed and the same is dismissed at the admission stage.

Mr.S.N. Bhatt, learned Advocate for the petitioner, requested that the present order may be stayed for some time in order to enable the petitioner to approach the Honourable Supreme Court. Considering the said request, execution and operation of the decree for possession is stayed for a period of two months from today in order to enable the petitioner to approach the Supreme Court. However, in the meanwhile, the petitioner shall not alienate or transfer the suit property and he shall not create any encumbrance over the suit property.

20th January, 2004 (P.B. Majmudar, J.)

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(apj)